

FILED
US DISTRICT COURT
DISTRICT OF ALASKA

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MARK R.M. HOLMSTRAND,

Plaintiff,

vs.

Case No. A05-0066 CV (JKS)

NEW YORK LIFE INSURANCE
COMPANY, a foreign corporation, PAUL
REVERE LIFE INSURANCE COMPANY,
a Massachusetts Corporation,
UNUMPROVIDENT CORPORATION, a
Delaware Corporation (d/b/a, inter alia, Paul
Revere Life Insurance Company, Unum
Life Insurance Company, a Maine
Corporation, Provident Life and Accident
Insurance Company, a Tennessee
Corporation, and GENEX, a Pennsylvania
Corporation) and ROBERT
LEIMGRUBER, an Ohio Resident.

ANSWER TO COUNTERCLAIMS

COMES NOW plaintiff, Mark Holmstrand, by and through his attorneys and answers
the counterclaims contained within defendants New York Life Insurance Company, Paul

1 Revere Life Insurance Company and UnumProvident Corporation's (hereafter referenced as
2 defendants) Amended Answer And Counterclaim dated December 1, 2005 as follows:

- 3 1. Plaintiff admits the allegations of paragraph 1.
- 4 2. Plaintiff admits that Paul Revere Life Insurance Company is doing business in the
5 State of Alaska. Except as so admitted plaintiff denies the remaining allegations of
6 paragraph 2 of defendants' counterclaim.
- 7 3. Plaintiff admits that defendant UnumProvident Corporation is a Delaware general
8 business corporation. Plaintiff denies that UnumProvident Corporation is not an
9 insurer or an insurance holding company based on its legal and de facto control of
10 entities such as Paul Revere Life Insurance Company, Provident Life and Accident
11 Insurance Company and Unum Life Insurance Company and the activities it
12 engages in on such entities behalf. Plaintiff admits that Paul Revere Life Insurance
13 Company is an indirect wholly owned subsidiary of UnumProvident. Plaintiff
14 specifically denies that as an indirect subsidiary Paul Revere Life Insurance
15 Company is not totally dominated and controlled by UnumProvident such as to
16 make such entities a single enterprise, alter ego or joint venture in transacting the
17 business of insurance.
- 18 4. Plaintiff admits the allegations of paragraph 4 of defendants' counterclaims.
- 19 5. Plaintiff admits the first sentence of paragraph 5 of defendants' counterclaims.
20 With respect to the remainder of paragraph 5 the contract speaks for itself and to the
21 extent that defendants attempt to characterize the contents thereof plaintiff denies
22 that their characterization is either complete or accurate in all aspects.
- 23 6. Plaintiff admits that his employment at R&M was terminated. Plaintiff denies that
24 such termination was proper. In further response plaintiff avers that for
25 approximately 23 years he had been an employee of R&M with increasing positions
26 of responsibility within the firm. Plaintiff further avers that at all relevant times
27 herein prior to losing his position at R&M he was an owner of the firm. Plaintiff
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1 further avers that beginning in or around 1995-96 he began to suffer from carpal
2 tunnel syndrome and that he had a variety of other medical problems including but
3 not limited to sleep apnea, depression and adult onset diabetes mellitus type II.
4 Plaintiff further avers that any problems he had at work were a consequence of his
5 medical problems of which R&M was aware and that in August 2000 he began to
6 negotiate his leaving employment with R&M. On November 15, 2000 after those
7 negotiations broke down R&M took steps to terminate his employment and
8 ownership interest in the firm and an associated real estate partnership. Plaintiff
9 denies the last sentence of paragraph 6

- 10 7. Plaintiff admits that he applied for benefits. Plaintiff denies that he put defendants
11 on notice of claim only after his employment with R&M terminated but plaintiff
12 admits that the process of submitting information in support of his claim extended
13 past the time of his termination by R&M. Plaintiff denies that "he falsely claimed
14 that he has suffered a loss of income from R&M that had resulted from sickness,
15 primarily carpal tunnel syndrome, directly and apart from any other cause."
16 Plaintiff denies the second sentence of paragraph 7 of defendants' counterclaims.
17 To the extent that said sentence is predicated on defendants contention that plaintiff
18 was required to have lost his job solely as a result of sickness or injury in order to
19 obtain benefits under the policy of insurance plaintiff denies that said policy
20 contains such terms or conditions and that defendants attempts to impose such
21 conditions constitutes an additional act of bad faith. Plaintiff further avers that in
22 applying for benefits he cooperated with defendants providing them information
23 which they requested to the extent it was available and provided defendants with a
24 full release which enabled defendants to inquire of his employer concerning what
25 R&M believed were the causes for his termination. Plaintiff admits that among
26 other information provided to defendants in support of his claim for benefits he
27 provided them with medical records and statements from medical providers.
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1 Plaintiff denies that said providers “based their medical opinions primarily on false,
2 incomplete and misleading information provided by Holmstrand.” Except as
3 specifically admitted, plaintiff specifically denies all further allegations contained in
4 paragraph 7 of defendants’ counterclaims.

5
6 8. Plaintiff admits the allegations of paragraph 8. Plaintiff further avers in response
7 that defendants statement his “application for benefits was rejected on or about
8 September 4, 2001 based on the determination that while he had certain medical
9 limitations, the occupational demands of his position with R& M were within his
10 medical restrictions or limitations” constitutes a binding judicial admission that on
11 or about September 4, 2001 defendants breached the contract of insurance with
12 plaintiff by denying his application for benefits based on a condition not contained
13 within the policy of insurance.

14 9. Plaintiff admits that in November 2001 he entered into a confidential settlement
15 agreement with R&M among other entities and individuals. Said release speaks for
16 itself and to the extent defendant/counterclaimants allegations contain
17 characterizations concerning such release such allegations and characterizations are
18 specifically denied. Plaintiff admits the last sentence of paragraph 9. In further
19 response to said sentence plaintiff avers that in applying for benefits he cooperated
20 with defendants providing them information which they requested to the extent it
21 was available and provided defendants with one or more releases dated after
22 November 2001 which enabled defendants to inquire of his employer concerning
23 what R&M believed were the causes for his termination. Except as specifically
24 admitted, plaintiff specifically denies all further allegations contained in paragraph
25 9 of defendants’ counterclaim.

26 10. Plaintiff admits that a second letter was drafted in an effort to overturn the improper
27 denial of benefits based on an attempt to meet the improper standard as referenced
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1 in paragraph 8 of this answer. Except as specifically admitted, plaintiff specifically
2 denies all further allegations contained in paragraph 10 of defendants' counterclaim.

3 11. Plaintiff admits that in August 2002 defendants' reversed their prior claim denial
4 and began paying the claim without reservation of rights. Plaintiff further admits
5 that defendants paid \$178,230 before improperly terminating benefits again on or
6 about September 10, 2004. Because defendants claim file fails to contain any
7 correspondence with plaintiff concerning the benefits paid in August 2002 plaintiff
8 is unable to determine whether the total amount paid accurately reflects what was
9 due and owing on the policy including interest as required by law. Except as
10 specifically admitted, plaintiff specifically denies all further allegations contained in
11 paragraph 11 of defendants' counterclaim.

12 12. Plaintiff denies the allegations of paragraph 12 of defendants' counterclaim in their
13 entirety.

14 13. Plaintiff denies the allegations of paragraph 13 of defendants' counterclaims in their
15 entirety.

16 14. Plaintiff admits the allegations of paragraph 14 of defendants' counterclaims. In
17 further response plaintiff denies that discontinuance of benefits was proper or
18 lawful and indeed contends that such discontinuance was improper under the
19 contract and was done in bad faith as alleged in greater detail in plaintiff's
20 complaint.

21 15. With respect to the first sentence of paragraph 15 of defendants' counterclaims,
22 plaintiff admits that he filed his complaint on or about February 25, 2005. The
23 complaint speaks for itself and plaintiff specifically denies any allegations that the
24 complaint contains any false allegations. With respect to the second sentence of
25 paragraph 15 of defendants' counterclaims plaintiff admits that on or about August
26 30, 2005 defendants made what they allege was a payment of benefits under his
27 policy subject to a reservation of rights. Plaintiff denies that defendants have the
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1 unilateral ability to reinstate benefits after their insured files suit. Except as
2 specifically admitted, plaintiff specifically denies all further allegations contained in
3 the second sentence of paragraph 15 of defendants' counterclaims. Plaintiff denies
4 the allegations in the third sentence of paragraph 15 of defendants' counterclaims.
5 Plaintiff denies the allegations of the fourth sentence of paragraph 15 of defendants'
6 counterclaims. Plaintiff further avers that at the time defendants' tendered
7 payments on August 30, 2005 they had more than sufficient information to make
8 such payments without reservation of rights. Plaintiff further avers that any further
9 investigation conducted by defendants either in defense of the ongoing lawsuit or
10 ostensibly as part of their claim process, was an investigation conducted not for the
11 purpose of fairly evaluating plaintiff's claim for benefits but rather for the purpose
12 of manufacturing bases both to defend the ongoing litigation and to deny the claim.
13 As such, the conduct of defendants in asserting a reservation of rights with respect
14 to past due claim payments and in conducting an investigation for the purpose of
15 manufacturing grounds to deny plaintiff's benefit claims constitute separate and
16 distinct acts of bad faith actionable under Alaska law. With respect to the fifth
17 sentence of paragraph 15 of defendants' counterclaims Plaintiff admits that
18 defendants tendered \$47,000.47 on August 30, 2005. Plaintiff denies that such
19 amounts were paid under policy and avers that defendants have been informed that
20 such payments are not considered by plaintiff as payments under the policy, but
21 rather as mitigation of damages for defendants' breach of contract and prior bad
22 faith termination of benefits. *See* attached Exhibit 1 (without enclosures).
23 Subsequently, defendants tendered three more checks to plaintiff in the amount of
24 \$3900; one on September 27, 2005, one on October 27, 2005 and one on December
25 5, 2005. Except as specifically admitted, plaintiff specifically denies all further
26 allegations contained in the fifth sentence of paragraph 15 of defendants'
27 counterclaims.
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1 16. In response to paragraph 16 of defendants' counterclaims plaintiff admits that
2 defendants have used subpoenas and production requests. Except as specifically
3 admitted, plaintiff specifically denies all further allegations contained in paragraph
4 16 of defendants' counterclaims.

5 17. Plaintiff is without information to admit or deny the allegations of paragraph 17 of
6 defendants' counterclaims with respect to what "counterclaimants have
7 determined." Plaintiff specifically denies defendants allegation that "Holmstrand is
8 not now and never was entitled to receive any benefits under policy, and that he has
9 obtained benefits under the policy without disclosing information which should
10 have been revealed to determine any entitlement under the policies."

11 18. Paragraph 18 to defendants' counterclaims states legal conclusions all of which are
12 denied. To the extent said paragraph contains factual allegations such allegations
13 are specifically denied.

14 **FIRST CLAIM FOR RELIEF**

15 19. Plaintiff incorporates by reference his prior answers to paragraphs 1-18 of
16 defendants' counterclaims as though full set forth herein.

17 20. Plaintiff denies the allegations of paragraph 20 of defendants' counterclaims.

18 21. Plaintiff denies the allegations of paragraph 21 of defendants' counterclaims.
19 Plaintiff specifically denies that defendants have ever made any demand for
20 repayment prior to filing the counterclaims to which he is responding.

21 22. Plaintiff denies the allegations of paragraph 22 of defendants' counterclaims.

22 **SECOND CLAIM FOR RELIEF**

23 23. Plaintiff incorporates by reference his prior answers to paragraphs 1-22 of
24 defendants' counterclaims as though full set forth herein.

25 24. Plaintiff admits he has been paid certain benefits under this policy. Plaintiff
26 specifically denies that "he was not and is not entitled" to such benefits.

27 25. Plaintiff denies the allegations of paragraph 25 of defendants' counterclaims.
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1 26. Plaintiff denies the allegations of paragraph 26 of defendants' counterclaims.

2 **THIRD CLAIM FOR RELIEF**

3 27. Plaintiff incorporates by reference his prior answers to paragraphs 1-26 of
4 defendants' counterclaims as though full set forth herein.

5 28. Plaintiff admits he has been paid certain benefits under this policy. Plaintiff
6 specifically denies that "he was not and is not entitled" to such benefits.

7 29. Plaintiff denies the allegations of paragraph 29 of defendants' counterclaims.

8 30.-32. Defendants' counterclaims as served on plaintiff contained no paragraphs 30,
9 31 or 32. To the extent said paragraphs exist in any pleading plaintiff denies the
10 contents thereof.

11 33. Plaintiff denies the allegations of paragraph 33 of defendants' counterclaims.

12 **FOURTH CLAIM FOR RELIEF**

13 34. Plaintiff incorporates by reference his prior answers to paragraphs 1-33 of
14 defendants' counterclaims as though full set forth herein.

15 35. Plaintiff denies the allegations of paragraph 35 of defendants' counterclaims.

16 36. Plaintiff denies the allegations of paragraph 36 of defendants' counterclaims.

17 **AFFIRMATIVE DEFENSES**

18 1. By their prior payment of benefits without reservation of rights after having had a
19 full opportunity to investigate the claim defendants have waived any claim that
20 prior payments made without reservation of rights were made improperly.

21 2. Defendants continued payment of benefits after learning of the alleged basis for
22 termination based on the allegations of the counterclaim constitutes a knowing and
23 voluntary waiver of said claims in whole or in part.

24 3. Defendants are estopped by their own prior conduct from asserting the claims made
25 in their counterclaims.
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4. Defendants are precluded by the ~~mend~~ the hold doctrine from changing the basis for their decisions to deny claims based on information developed in the context of litigation to defend their prior breach of contract.
5. Defendants may not rely upon information developed after litigation ensues to defend their conduct with respect to whether they terminated plaintiff's benefits in bad faith.
6. Defendants' counterclaims are barred in whole or in part by the doctrine of laches.
7. Defendants' counterclaims are barred in whole or in part by the statute of limitations.
8. Such further defenses and affirmative defenses as may be revealed through further discovery and analysis.


Wherefore, having answered defendants' counterclaims and having asserted affirmative defenses thereto plaintiff moves:

1. For an order awarding judgment on the claims he has asserted in his complaint against defendants in an amount to be determined at trial;
2. For an order dismissing defendants' counterclaims;
3. For an award of costs, attorneys fees and prejudgment interest as provided by law in pursuit of plaintiff's underlying claims and an additional award for those costs and fees incurred in defending the counterclaims asserted by defendants;
4. And for such further relief as may be awarded in law or equity.

DATED this 15 day of December, 2005.

CERTIFICATE OF SERVICE

I Hereby Certify That I
Have Served The
Foregoing Document(s)
And: Exh 1
Upon: Scott Hendricks Leving,
Prostate Cancer
Via Mail Hand Delivery
This 15 Day Of DEC, 2005
Angela Pittman
Friedman, Rubin & White


Jeffrey K. Rubin AK Bar No. 8206061
Friedman, Rubin & White
Attorneys for Plaintiff Mark Holmstrand

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September 12, 2005

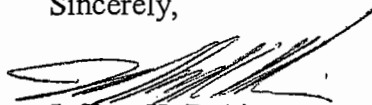
Brewster Jamieson
Lane Powell Spears Lubersky
301 West Northern Lights Blvd.
Suite 301
Anchorage, AK 99503-2648

Re: Holmstrand v. New York Life,

Dear Brewster:

Enclosed please find a letter and copies of checks tendered by your client to Mr. Holmstrand. While we accept these funds of past due amounts and interest as defendants attempt to partially mitigate damages that they have caused Mr. Holmstrand through their breach of contract and bad faith termination of benefits, we reject the proposition that defendants may unilaterally reinstate the contract by such action. With respect to the payments made pursuant to Ms. Kirby's letter, or any future payments, we will credit such payments towards any future judgment.

Sincerely,



Jeffrey K. Rubin
Friedman, Rubin & White
Attorneys for Mark Holmstrand

Cc: Richard Friedman

Encl. As stated

EXHIBIT 1
PAGE 1 OF 1